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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 254

DORIS SHIPMAN HUNTEMAN, INDIVIDUALLY AND AS GUARDIAN, ETC.,

Petitioner,

vs.

NEW ORLEANS PUBLIC SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN W. HARRELL,
Counsel for Petitioner.

JAMES W. HOPKINS,
Of Counsel for Petitioner.

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No. 254

DORIS SHIPMAN HUNTEMAN, INDIVIDUALLY AND AS GUARDIAN, ETC.,
Petitioner and Appellant below,
vs.
NEW ORLEANS PUBLIC SERVICE, INC.,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Mrs. Doris Shipman Hunteman, individually and as guardian of her seven minor children, Viva Lucille, Dorothy Ann, Richard Elvin, Betty Jo, Thomas Harold, James Edward and Nancy Lou Hunteman, respectfully shows:

I.

Summary Statement of the Matter Involved.

On April 22, 1940 petitioner filed this suit for herself and her seven minor children in the United States District

Court for the Eastern District of Louisiana, New Orleans Division, to recover damages occasioned by the death of Henry Hunteman, her husband and father of the children, on January 11, 1940. Decedent was electrocuted at the site of the Southern Regional Agricultural Laboratory in New Orleans, Louisiana where he was working as a member of an independent subcontracting firm. Decedent received an electric charge causing his death when the steel cable of a crane or the boom of the crane came in contact with the electric line of the New Orleans Public Service, Inc. The crane belonged to Arthur J. Rife, the main contractor, and was operated by his employees. The defendants in the action are the New Orleans Public Service, Inc., Rife and his insurance carrier, The Liberty Mutual Insurance Company.

Petitioner in her complaint charges the New Orleans Public Service, Inc. and Rife with negligence causing the death of her husband. Independent and distinct, although concurrent, acts of negligence are alleged against these two defendants. There is and was no relationship between these two defendants. The New Orleans Public Service, Inc. is charged with negligence in maintaining its electric wires and not having them insulated, and keeping charged with current when not needed or being used, and not installing any protective devices or posting and giving any warning, although to its knowledge the construction work on the buildings for the said Laboratory had been going on for several months and the electric line was in close proximity so as to constitute a hazard to the workmen, and although this Company had been requested to remove or disconnect the line adjacent to the construction work, it failed to do so until after the accident. It is set out that the building material as well as the machines, equipment and tools, some of which were long, tall and cumbersome, had to be moved under or over the electric line and used nearby, and

that there was serious and obvious danger of contact being made with the highly charged wires. Rife is charged with using a defective machine and furnishing an incompetent operator therefor, and the careless handling of the machine by the operator.

The defendants, Rife and the Insurance Company, filed answers denying any negligence on the part of Rife or his employees and pleading contributory negligence. The New Orleans Public Service, Inc. filed a motion to dismiss the action for failure to state a claim upon which relief could be granted.

The District Judge on July 10, 1940 entered an order maintaining the motion to dismiss, which order reads as follows:

> "This cause came on for hearing on July 3, 1940, on motion filed by defendant New Orleans Public Service Inc. to dismiss the complaint as to said defendant for failure to state a claim upon which relief can be granted and was argued by counsel for the respective parties and submitted, when the Court took time to consider.
>
> "Whereupon, and on due consideration thereof,
>
> "It is ordered by the Court that said motion be, and the same is, hereby maintained, and the complaint is dismissed as to the defendant, New Orleans Public Service, Inc., at plaintiff's costs."

Petitioner, on July 18, 1940, gave notice of appeal from this order of dismissal to the United States Circuit Court of Appeals for the Fifth Circuit, and the appeal was lodged in that Court on August 20, 1940. After hearing on April 2, 1941, that Court, on May 2, 1941, handed down a decision dismissing the appeal on the ground that the order of dismissal by the District Court was not a final judgment. Petitioner timely applied for rehearing, which was refused on May 31, 1941.

This case is now reported in 119 F. (2d) 465.

II.

Jurisdictional Statement.

Petitioner believes that this Honorable Court has jurisdiction to review the judgment in question, and to issue a writ of certiorari under the Judicial Code, Section 240 amended (28 U. S. C. A. 347), and Judicial Code 262 (28 U. S. C. A. 377). The cases cited below are believed to sustain the jurisdiction, viz.:

Church Street Bldg. Corporation, 57 S. Ct. 88, 299 U. S. 24, 81 L. Ed. 458;

Sibbach v. *Wilson & Co., Inc.,* 61 S. Ct. 422, 309 U. S. 650, 84 L. Ed. 1001;

Palmer v. *Webster & Atlas Nat. Bank of Boston,* 61 S. Ct. 542.

III.

Louisiana Law on Solidary Liability of Co-tort Feasors.

Solidary liability is defined in Article 2091 of the Louisiana Civil Code of 1870 as follows:

> "There is an obligation in solido, on the part of the debtors, when they are all obligated to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor."

Under the Louisiana law, co-tort feasors are liable *in solido.* Suit may be brought against one or both of them, or separate suit may be filed against each. See *Shield* v. *F. Johnson & Son Company, Ltd.,* 132 La. 773, 61 So. 787; *Rumpf* v. *Callo,* 16 La. App. 12, 132 So. 763. In Louisiana, there is no contribution between joint *tort feasors* unless they are cast in one suit. *Quatray* v. *Wicker,* 178 La. 289, 151 So. 208; *Aetna Life Insurance Company* v. *DeJean,* 185 La. 1074, 171 So. 450.

IV.

Question Presented.

Is an order of a District Court dismissing an action as to one of two defendants a final decree so as to be appealable where the action is brought against two defendants as *co-tort feasors* who are charged with separate and distinct acts of negligence, and judgment is sought *in solido* against the defendants under the Louisiana law?

V.

Reasons Relied Upon for Allowance of the Writ.

A.

It is appropriate and desirable that the appellate jurisdiction of the United States Circuit Courts of Appeal as provided by Judicial Code Section 128 amended (28 U. S. C. A. 225) be reappraised and clarified in view of the adoption of the Federal Rules of Civil Procedure. It is believed that these rules may necessitate modification of the judicial interpretations of "final decisions".

Rule 54 (b) of the Federal Rules of Civil Procedure permitting judgment at various stages, reads as follows:

> "JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such condi-

tions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

There are to be further considered Rules 18 and 20 permitting of liberal joinder of claims and defendants.

There is to be further considered Rule 73 (b) wherein it is provided that the Notice of Appeal shall, among other things, designate the judgment or part thereof appealed from.

Two separate claims are presented. As to the claim disposed of, the action is terminated under the provisions of Rule 54 (b). Hence, the order of dismissal of petitioner's claim against the New Orleans Public Service, Inc. would appear to be "final".

B.

There seems to be some conflict in the decisions of the various Circuit Courts of Appeal as to what judgment has the finality required to be appealable where the action is brought against more than one defendant, and there is an order of dismissal as to a defendant. This conflict appears to have existed before the adoption of the Federal Rules of Civil Procedure and still to exist. In the instant case, and also in *Menge* v. *Warriner,* 120 Fed. 816 (1903), the Fifth Circuit Court of Appeals has held that the order of dismissal as to one defendant sued *in solido* with another one lacks the finality requisite for an appeal. That court has not made any distinction between *joint* liability and that *in solido.* The First Circuit Court of Appeals in *Curtis* v. *Connly, et al.,* 264 Fed. 650 (1920) upheld its jurisdiction to entertain an appeal where there was a judgment of dismissal as to certain, but not all, of the defendants, and the plaintiff appealed. The basis of this ruling was that each defendant was under a separate liability, and that a separate action at law might have been brought against him. In *Thompson* v. *Murphy,* 93 F. (2d) 38 (1937) an order attack-

ing service of process as to some of the defendants who were not claimed to be jointly liable with other defendants was held to have completely determined the rights of the defendants affected by it and was reviewable as a "final decision". The order of dismissal of the New Orleans Public Service, Inc., if permitted to stand, appears to completely determine the rights of petitioner against that Company.

Since the adoption of the new Rules, the various Circuit Courts do not seem to have been in accord as to what effect, if any, these Rules may have on the definition of a "final decree," and the judges in the various courts have not always been in unanimity. The Second Circuit Court in *Collins* v. *Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 83 (1939) discussed the inconvenience in deferring the review of the disposition of a claim, though finally disposed of, until other ~~suitable~~ claims have been adjudicated. It was there said that this consideration was undoubtedly the reason for the adoption of Rule 54(b). That court went on to say:

> "The new Rules provide for the presentation of numerous claims and the participation of multiple parties in a single civil action. Rules 13, 14, 18, 20 and 24. Rule 18 authorizes unlimited joinder of claims where there is only one plaintiff and one defendant. It is evident that the court must be given extensive discretionary powers in order to expedite a determination of the issues and avoid delay and inconvenience. Rule 42(b) conferring power to order a separate trial of any claim or any separate issue, and Rule 54(b) conferring power to enter separate judgments at various stages, appear to have been designed to meet the difficulties arising from these liberal joinder provisions."

See further, *Bowles* v. *Commercial Casualty Insurance Company*, 107 F. (2d) 169 (C. C. A. 4th, 1939); *Sidis* v. *F. R.*

Publishing Company, 113 F. (2d) 806 (C. C. A. 2nd, 1940). Judge Clark dissented in the latter case.

In *Atwater* v. *North American Coal Corporation,* 111 F. (2d) 125 (1940) the Second Circuit Court distinguished the appeal therein from *Collins* v. *Metro-Goldwyn Pictures Corporation, supra,* since "that was not a case where the dismissal touched some but not all defendants." In *Atwater* v. *North American Coal Corporation,* the defendants were charged jointly in four counts. Dismissal was not complete as to all counts, or as to any defendant. Judge Clark concurred pointing out that "the defendants have obtained nothing of substance by the partial dismissal below."

C.

The United States Supreme Court does not appear to have expressly ruled on the appealability or not of an order dismissing the suit as to one of the defendants claimed to be liable *in solido* where separate, yet concurrent, acts of negligence are charged against the defendants, and the State law permits of separate suits against the defendants. It is respectfully suggested, however, that the appeal in the instant matter is within the spirit and intendment of the exception recognized by this Honorable Court to the general rule that an appeal may be only from a final judgment. The controversy between petitioner and the New Orleans Public Service, Inc., is separable from that between petitioner and Rife. The order of dismissal herein disposed entirely of petitioner's claim against the New Orleans Public Service, Inc., and at the trial of the suit against the remaining defendants, petitioner would not be permitted to offer evidence as to the negligence charged to that Company. As to the exception to the general rule recognized by this Court, see *Hill* v. *Chicago, etc., R. R.,* 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331; *Collins* v. *Miller,*

252 U. S. 364, 370, 40 S. Ct. 347, 349, 64 L. Ed. 616; *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339.

VI.

Petitioner presents to this Court and files herewith a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket "No. 9644, Doris Shipman Hunteman, Individually and as Guardian, etc., Appellant, versus New Orleans Public Service, Inc., et al., Appellee" to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and for such further relief as to this Court may seem proper.

New Orleans, Louisiana, July 3rd, 1941.

DORIS SHIPMAN HUNTEMAN,
Petitioner,

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